ARTICLE III. RIGHTS OF PARTIES.

RULE 6. ATTORNEYS, APPOINTMENT OF COUNSEL.

Rule 6.1(a) Rights to counsel; waiver of rights to counsel—Right to be represented by counsel.

6.1.a.030 The right to be represented by an attorney includes the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant has been taken into custody and at reasonable times after that, as long as the consultation does not disrupt an on-going investigation.

State v. Rumsey, 225 Ariz. 374, 238 P.3d 642, ¶¶ 3–11 (Ct. App. 2010) (as result of hitting two bicyclists, defendant was arrested for manslaughter, aggravated assault, DUI, and leaving scene of accident; while at scene, defendant spoke with her attorney for 6 minutes and told officers her attorney would arrive in about 15 minutes (at 8:30 p.m.); when attorney had not arrived by 8:35, defendant was taken to police station; attorney arrived at approximately 8:50 and agreed to follow officer to police station; on way to police station officers noticed attorney made wrong turn; at police station at 9:10, defendant consented to blood draw; before conducting blood draw, officer decided to obtain warrant for three separate blood draws spaced 1 hour apart; at 9:26, search warrant was issued; at 9:27, officer was notified defendant's attorney had arrived; at 9:28, warrant was served on defendant; at 9:31, first blood draw occurred; defendant then consulted with attorney before the two subsequent blood draws; at approximately 1:00 a.m., defendant took her own independent blood test; court held defendant was denied right to counsel when attorney arrived at station and made his presence known to officers, and state failed to establish that investigation would have been hindered by allowing defendant to consult with her attorney before first blood draw).

6.1.a.070 When police conduct interferes with both the defendant's right to counsel *and* the ability to collect exculpatory evidence, the remedy is dismissal with prejudice, but when police conduct interferes with only the defendant's right to counsel but not the ability to collect exculpatory evidence, the remedy is suppression of the state's evidence.

State v. Rumsey, 225 Ariz. 374, 238 P.3d 642, ¶¶ 12–15 (Ct. App. 2010) (as result of running into two bicyclists, defendant was arrested for manslaughter, aggravated assault, DUI, and leaving scene of accident; while at accident scene, defendant spoke with her attorney for approximately 6 minutes and told officers her attorney would arrive in about 15 minutes (at 8:30 p.m.); when attorney had not arrived by 8:35, defendant was taken to police station; attorney arrived at approximately 8:50 and agreed to follow officer to police station; on way to police station officers noticed attorney made wrong turn; at police station at 9:10, defendant consented to blood draw; before conducting blood draw, officer decided to obtain warrant for three separate blood draws spaced 1 hour apart; at 9:26, search warrant was issued; at 9:27, officer was notified defendant's attorney had arrived; at 9:28, warrant was served on defendant; at 9:31, first blood draw occurred; defendant then consulted with attorney before the two subsequent blood draws; at approximately 1:00 a.m., defendant took her own independent blood test; court held defendant was denied right to counsel when attorney arrived at station and made his presence known to officers; because defendant did not assert violation of right to counsel deprived her of any exculpatory evidence, trial court correctly concluded dismissal of DUI charge was not appropriate).

6.1.a.080 If the police conduct has interfered with the defendant's right to counsel, suppression of the state's evidence is not required unless a nexus exists between the violation and the evidence obtained.

State v. Rumsey, 225 Ariz. 374, 238 P.3d 642, ¶¶ 21–22 (Ct. App. 2010) (as result of running into two bicyclists, defendant was arrested for manslaughter, aggravated assault, DUI, and leaving scene of accident; while at accident scene, defendant spoke with her attorney for approximately 6 minutes and told officers her attorney would arrive in about 15 minutes (at 8:30 p.m.); when attorney had not arrived by 8:35, defendant was taken to police station; attorney arrived at approximately 8:50 and agreed to follow officer to police station; on way to police station officers noticed attorney made wrong turn; at police station at 9:10, defendant consented to blood draw; before conducting blood draw, officer decided to obtain warrant for three separate blood draws spaced 1 hour apart; at 9:26, search warrant was issued; at 9:27, officer was notified defendant's attorney had arrived; at 9:28, warrant was served on defendant; at 9:31, first blood draw occurred; defendant then consulted with attorney before the two subsequent blood draws; at approximately 1:00 a.m., defendant took her own independent blood test; court held defendant was denied right to counsel when attorney arrived at station and made his presence known to officers; court held, however, because officers obtained warrant for drawing of defendant's blood, and because basis for obtaining warrant was not related in any way to the subsequent violation of defendant's right to counsel, there was no nexus between depravation of defendant's right to counsel and blood evidence defendant sought to suppress, thus trial court did not err in denying defendant's motion to suppress blood evidence and in suppressing only that evidence tainted by violation of defendant's right to counsel: statements defendant made during blood draw).

Rule 6.1(c) Rights to counsel; waiver of rights to counsel—Waiver of right to counsel.

6.1.c.150 Under the Due Process Clause of the Fourteenth Amendment, the competency standard for waiving the right to counsel is the same as the competency standard for standing trial.

State v. Gunches, 225 Ariz. 22, 234 P.3d 590, ¶¶ 7–12 (2010) (defendant did not claim trial court erred in finding him competent to stand trial, he instead contended he was unable to present his own defense without help of counsel; court concluded defendant had sufficient ability to conduct his own trial).

6.1.c.160 A state has the right to insist upon representation by counsel for certain "gray area" defendants who may be competent to stand trial but are unable to carry out the basic tasks needed to present a defense without the help of counsel, but the Due Process Clause does give such defendants a constitutional right to have the trial court deny their request for self-representation.

State v. Gunches, 225 Ariz. 22, 234 P.3d 590, ¶¶ 7–12 (2010) (defendant did not claim trial court erred in finding him competent to stand trial, he instead contended he was unable to present his own defense without help of counsel; court concluded defendant was not "gray area" defendant unable to carry out basic tasks needed to present defense without help of counsel, and instead had sufficient ability to conduct his own trial).

RULE 7. RELEASE.

Rule 7.6(c)(2) Transfer and disposition of bond—Forfeiture procedure—Forfeiture.

7.6.c.2.010 If the surety does not appear at the forfeiture hearing, the trial court may order forfeiture of the bond.

State v. Eazy Bail Bonds, 224 Ariz. 227, 229 P.3d 239, ¶¶ 12–17 (Ct. App. 2010) (because corporation may not appear in superior court except through counsel, and because president of bail bond company appeared on behalf of bail bond company but was not permitted to represent bail bond company pursuant to Rule 31 of the Arizona Supreme Court, bail bond company was considered not to have made appearance at bond forfeiture hearing, thus trial court properly forfeited bond).

7.6.c.2.020 The trial court may order forfeiture of all or part of the bond if it determines there has been a violation of the conditions of the appearance bond and there is no explanation or excuse for the violation.

State v. Bail Bonds USA, 223 Ariz. 394, 224 P.3d 210, ¶¶ 13–14 (Ct. App. 2010) (defendant was charged with state felonies; once she was arrested, surety posted $25,000 appearance bond for her, and she was then released to federal custody; when defendant failed to appear for state arraignment, trial court issued bench warrant and set bond forfeiture hearing; at forfeiture hearing, surety presented letter stating defendant was in federal detention center pending trial on federal charges; because defendant was still potentially available (assuming she was not later deported), trial court erred in forfeiting appearance bond at that point in the proceedings).

RULE 11. INCOMPETENCY AND MENTAL EXAMINATIONS.

Rule 11.2(a) Motion to have defendant's mental condition examined—Motion for Rule 11 examination.

11.2.a.010 At any time after an information or complaint is filed or indictment returned, any party may request in writing an examination to determine whether a defendant is competent to stand trial, or to investigate the defendant's mental condition at the time of the offense.

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 14–18 (2010) (based on Rule 11 examination, trial court found defendant not competent to stand trial; 5 months later, trial court determined defendant was now competent; 11 months later, defendant's attorney requested second Rule 11 examination alleging defendant suffered from delusions and therefore could not assist in his defense; court held that was not sufficient reason to order another examination, thus trial court correctly denied request for second Rule 11 examination).

Rule 11.2(d) Motion to have defendant's mental condition examined—Jurisdiction.

11.2.d.020 If the judge of a lower court determines a full mental health examination is necessary, the judge must transfer the matter to the superior court for appointment of mental health experts; once the lower court judge has done so, the superior court judge is not permitted to revisit the issue whether a full mental health examination is necessary, and must instead appoint the mental health experts).

Potter v. Vanderpool, 225 Ariz. 495, 240 P.3d 1257, ¶¶ 9–14 (Ct. App. 2010) (JP appointed doctor to conduct pre-screening examination, and based on that report, JP granted motion for full mental health examination and transferred matter to superior court; court held superior court judge erred in revisiting issue whether defendant should receive full mental health examination and instead should have appointed mental health experts to conduct full Rule 11 examination).

Rule 11.5(a) Hearing and orders—Hearing.

11.5.a.010 Within 30 days after experts have submitted their reports, the trial court shall hold a hearing to determine the defendant's competency.

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 9–16 (2010) (defendant had been found incompetent; while in restoration, Dr. L. submitted report concluding defendant had feigned earlier psychosis and was now competent; defendant's attorney and prosecutor stipulated that trial court could determine competency based on Dr. L's report; defendant contended attorneys stipulated to his competency and thus he was denied right to hearing; court disagreed and concluded attorneys only stipulated that trial court could base decision on report, and trial court's consideration of report was defendant's hearing).

Rule 11.6(a) Subsequent hearings—Grounds.

11.6.a.010 Once the trial court receives a report that a previously incompetent defendant now appears competent, the trial court must hold a new competency hearing.

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 9–16 (2010) (defendant had been found incompetent; while in restoration, Dr. L. submitted report concluding defendant had feigned earlier psychosis and was now competent; defendant's attorney and prosecutor stipulated that trial court could determine competency based on Dr. L's report; defendant contended attorneys stipulated to his competency and thus he was denied right to hearing; court disagreed and concluded attorneys only stipulated that trial court could base decision on report, and trial court's consideration of report was defendant's hearing).

ARTICLE IV. PRETRIAL PROCEDURES.

RULE 12. THE GRAND JURY.

Rule 12.9(a) Challenge to grand jury proceedings—Grounds.

12.9.a.120 Absent an indictment the state knew was partially based on perjured testimony, a defendant may challenge the denial of a motion for a new finding of probable cause only by special action; once the jurors have found the defendant guilty, the question of probable cause is no longer open, thus the defendant may not raise this issue on appeal.

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 10–12 (2010) (defendant contended prosecutorial misconduct because state presented no evidence of felony murder predicates of sexual assault and attempted sexual assault; assuming this was challenge to sufficiency of evidence, because defendant did not identify any false statements or perjured testimony, and because jurors had found defendant guilty, court would not address issue on appeal).

12.9.a.130 A defendant alleging prosecutorial misconduct in a grand jury proceeding generally must seek relief from an adverse trial court ruling through special action rather than waiting to raise such issues on appeal; the only exception is when the defendant can show the state knew that the indictment was based partially on perjured, material testimony.

State v. Snelling, 225 Ariz. 182, 236 P.3d 409, ¶¶ 10–11 (2010) (defendant contended prosecutorial misconduct because state presented no evidence of felony murder predicates of sexual assault and attempted sexual assault; because defendant did not identify any false statements or perjured testimony, court would not address issue on appeal).

RULE 13. INDICTMENT AND INFORMATION.

Rule 13.1(c) Definitions; timeliness—Timeliness.

13.1.b.010 An information must be filed within 10 days of a determination of probable cause, and if not timely filed, the case may be dismissed without prejudice upon the defendant's motion, but the defendant must file that motion no later than 20 days before trial; the filing of an information is not, however, a jurisdictional requirement, thus if the defendant does not challenge the lack of an information, the defendant may obtain relief on appeal only if the defendant is able to establish that any error was fundamental, and that the lack of a filed information caused prejudice.

State v. Maldonado, 223 Ariz. 309, 223 P.3d 653, ¶¶ 7–26 (2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded that Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

Rule 13.3(a) Joinder—Offenses.

13.3.a.010 An indictment or information is multiplicative (multiplicitous) if it charges a single offense in multiple counts; an indictment or information is duplicative (duplicitous) if it charges multiple offenses in a single count.

State v. Mason, 225 Ariz. 323, 238 P.3d 134, ¶¶ 2–9 (Ct. App. 2010) (defendant was charged as accomplice with two counts of aggravated assault, one alleging accomplice beat victim with police baton, and other alleging accomplice beat victim with baseball bat; court held these two acts constituted one assault, thus charging them in two counts was multiplicative (multiplicitous)).

RULE 15. DISCOVERY.

Rule 15.8 Disclosure prior to a plea deadline.

15.8.010 If the prosecution has imposed a plea deadline but does not provide the defense with discovery material at least 30 days prior to the plea deadline, the court, on the defendant's motion, shall consider the effect of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer, and if the court determines the prosecutor's failure to provide such disclosure materially affected the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

Rivera-Longoria v. Slayton, 225 Ariz. 572, 242 P.3d 171, ¶¶ 2–16 (Ct. App. 2010) (defendant was charged with child abuse; first prosecutor provided 1144 pages of disclosure and offered plea with no deadline; defendant declined plea offer; after *Donald* hearing, defendant asked whether plea was still available, and prosecutor said it was, but said that, if case did not settle, new prosecutor would assume case and plea might not be available; approximately 1 month later, new prosecutor assumed case, withdrew plea offer, and provided approximately 11,000 more pages of disclosure; court held withdrawal of plea offer was same as deadline, and remanded case for trial court to determine (1) whether state made material disclosures after it withdrew plea offer, and if so, (2) whether state's failure to disclose those materials until after it withdrew plea offer materially affected defendant's decision to decline plea offer, and if so, (3) what would be the appropriate sanction).

Rule 15.9(b) Appointment of investigator and expert witnesses for indigent defendants—Ex Parte Proceedings.

15.9.b.010 No *ex parte* proceeding, communication, or request may be considered unless a proper showing is made concerning the need for confidentiality.

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216, ¶¶ 6–7 (Ct. App. 2010) (trial court granted defendant's request for *ex parte* hearing to address defendant's mitigation matters; defendant contended Rule 15.9(b) justified trial court's order; court held Victim's Bill of Rights gave victim's family members right to be present at all proceedings, and that Rule 15.9(b) did not trump that right).

RULE 16. PRETRIAL MOTION PRACTICE; OMNIBUS HEARING.

Rule 16.1(d) General provisions—Finality of pretrial determination.

16.1.d.010 Once the trial court has determined an issue, that court or another of equal jurisdiction may not reconsider that issue in the same case, except upon a showing of good cause.

State v. Garcia, 224 Ariz. 1, 226 P.3d 370, ¶¶ 40–44 (2010) (prior judge granted defendant's motion to have *Edmund/Tison* inquiry resolved during guilt phase; when case was reassigned, trial judge ruled *Edmund/Tison* finding would be made during aggravation phase; because prior judge had decided *Edmund/Tison* issue incorrectly under Arizona law, trial judge did not err in reconsidering ruling of prior judge).

Rule 16.6(b) Dismissal of prosecution—On defendant's motion.

16.6.b.030 If the defendant makes a prima facie showing that the charging decision is more likely than not attributable to vindictiveness by the prosecutor, the burden shifts to the prosecutor to overcome the presumption by objective evidence justifying the prosecutor's action.

State v. Mieg, 225 Ariz. 445, 239 P.3d 1258, ¶¶ 8–23 (Ct. App. 2010) (officer saw scale in defendant's vehicle and arrested him for possession of drug paraphernalia; officer found methamphetamine in defendant's pocket; state charged defendant with possession of dangerous drug; after jurors were sworn, defendant made oral motion to preclude mention of scale or arrest for possession of drug paraphernalia, and trial court granted motion; while testifying, officer volunteered he had arrested defendant for possession of drug paraphernalia; trial court granted defendant's motion for mistrial; state obtained indictment charging defendant with possession of dangerous drug and possession of drug paraphernalia; trial court

found sufficient facts to support presumption of vindictiveness and that state failed to rebut presumption, and thus granted defendant's motion to dismiss both charges with prejudice; court held defendant failed to make prima facie showing sufficient to raise presumption of prejudice; court stated defendant failed to establish prosecutor acted with actual vindictiveness, and circumstances failed to show vindictiveness because (1) prosecutor was surprised by trial court's suppression ruling, (2) state acted reasonably by not charging possession of drug paraphernalia in first instance, and (3) state was permitted to change strategy in response to trial court's ruling; court reversed trial court's order and remanded for reinstatement of charges).

ARTICLE V. PLEAS OF GUILTY AND NO CONTEST.

RULE 17. PLEAS OF GUILTY AND NO CONTEST.

Rule 17.3(c) Duty of court to determine voluntariness and intelligence of the plea—Factual basis.

17.3.c.010 The trial court must find a factual basis for each element of the offense; the factual basis must show strong evidence of guilt and not necessarily proof beyond a reasonable doubt.

State v. Szpyrka, 223 Ariz. 390, 224 P.3d 206, ¶¶ 3–9 (Ct. App. 2010) (defendant pled guilty to 2007 felony with prior conviction for 2006 felony; defendant then appealed 2006 felony conviction, which appellate court vacated; defendant then brought petition for post-conviction relief in 2007 felony, contending there was no longer factual basis for plea; trial court agreed and set 2007 felony for resentencing; state objected because defendant subsequently entered guilty plea for 2006 felony; court agreed there was no longer factual basis for plea in 2007 felony, and defendant's subsequent guilty plea in 2006 felony did not establish factual basis because that guilty plea and (thus conviction) did not happen until after time of guilty plea in 2007 felony; court held, however, trial court erred in setting 2007 felony for resentencing because, once there was no longer factual basis, remedy was to set aside guilty plea in 2007 and set matter for trial).

ARTICLE VI. TRIAL.

RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF JURORS.

Rule 18.4(b) Challenges—Challenges for cause.

18.4.b.010 The trial court may strike a juror for cause when it appears that the juror cannot render a fair and impartial verdict, which happens when a juror indicates a predisposition for or against a party or a witness, or when a juror indicates he or she could not follow the trial court's instructions.

State v. Eddington, 226 Ariz. 72, 244 P.3d 76, ¶¶ 4–6 (Ct. App. 2010) (under this standard, peace officer is not automatically barred from serving as juror; in this case, peace officer should have been disqualified because of connections with case).

18.4.b.050 A prospective juror is disqualified by law from sitting on a jury if the prospective juror is interested directly or indirectly in the matter under investigation.

State v. Eddington, 226 Ariz. 72, 244 P.3d 76, ¶¶ 7–17 (Ct. App. 2010) (court held that peace officer who is currently employed by same agency, office, or department that conducted investigation in criminal case has at a minimum indirect interest in case and must therefore be stricken for cause; in this case, prospective juror was sheriff's deputy who was employed by same sheriff's department that investigated case, knew between one-third and one-half of state's 14 potential witnesses from that sheriff's department, including lead detective, and was currently assigned to provide security for county superior court and thus knew why there were two security officers in courtroom; court held trial court should have stricken that prospective juror for cause even though deputy repeatedly avowed he could be fair and impartial and would not treat testimony of law enforcement officers differently from any other witness).

18.4.b.140 If the trial court refuses to strike a juror for cause and the defendant uses a peremptory strike to remove that juror, the defendant is not entitled to automatic reversal and must instead make a showing of prejudice in order to obtain a reversal on appeal.

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 26–27 (2010) (defendant contended trial court erred in not striking juror for cause; because defendant then struck that juror, and because defendant made no showing jurors who decided case were not fair and impartial, no prejudicial error).

State v. Eddington, 226 Ariz. 72, 244 P.3d 76, ¶¶ 18–20 (Ct. App. 2010) (court held trial court should have stricken for cause prospective juror who was sheriff's deputy and was employed by same sheriff's department that investigated case; defendant contended he was prejudiced because use of peremptory strike prevented him from striking another prospective juror who worked as engineer and had rendered guilty verdict in another case; court stated those details may have made that prospective juror less appealing to defendant, but in no way suggested that prospective juror was biased or could not serve as fair and impartial juror, thus because defendant did not articulate anything beyond mere speculation how trial court's error affected outcome of case, court found error harmless).

Rule 18.4(c) Challenges—Peremptory challenges.

18.4.c.120 Once the state has offered a race-neutral explanation for the peremptory strike and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot.

State v. Garcia, 224 Ariz. 1, 226 P.3d 370, ¶ 25 (2010) (after defendant challenged prosecutor's strike of juror with Hispanic name, prosecutor gave reasons for strike; trial court denied challenge and noted two or three selected jurors appeared to have Hispanic names; on appeal, state contended defendant failed to make prima facie showing of discrimination; court held that issue was moot).

18.4.c.130 A *Batson* challenge involves three steps, the **second** of which is that, once a party has made out a *prima facie* case of purposeful discrimination, the burden shifts to the other party to show a nondiscriminatory explanation for the strike, which need not rise to the level justifying exercise of a challenge for cause.

State v. Gallardo, 225 Ariz. 560, 242 P.3d 159, ¶¶ 10–13 (2010) (after defendant made prima facie showing of discrimination in striking three jurors, prosecutor explained reasons for striking three jurors: (1) hardship, (2) negative feelings toward police, and (3) juror's crimi-

nal history; trial court found prosecutor's reasons were not pretexts, there was no pattern or practice of discrimination, and other minority jurors were ultimately selected; court held trial court did not abuse discretion in denying *Batson* challenge).

State v. Garcia, 224 Ariz. 1, 226 P.3d 370, ¶¶ 24–26 (2010) (after defendant challenged prosecutor's strike of juror with Hispanic name, prosecutor gave as reasons: (1) juror lacked high school education; (2) had been at her current job for only 1 year, which indicated lack of stability; (3) had problems understanding juror questionnaire and what was being said in court; and (4) could not read; court held prosecutor satisfied second step of analysis).

18.4.c.160 A *Batson* challenge involves three steps, the **third** of which is that, once a party has made a *prima facie* case of purposeful discrimination and the other party has shown a non-discriminatory explanation for the strike, the burden shifts back to the moving party to show the strike was for an improper reason; court will not reverse ruling of trial court unless reasons given are clearly pretextual.

State v. Garcia, 224 Ariz. 1, 226 P.3d 370, ¶¶ 24–27 (2010) (after defendant challenged prosecutor's strike of juror with Hispanic name, prosecutor gave as reasons: (1) juror lacked high school education; (2) had been at her current job for only 1 year, which indicated lack of stability; (3) had problems understanding juror questionnaire and what was being said in court; and (4) could not read; court held prosecutor satisfied second step of analysis and said third step of analysis was fact-intensive and that it would not second-guess trial court).

Rule 18.5(d) Procedure for selecting a jury—Voir dire examination.

18.5.d.010 Individual voir dire may be necessary because of unusually sensitive subjects or extensive pretrial publicity, but it is not required in capital cases.

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 22–24 (2010) (court rejected defendant's contention that individual voir dire was required in every capital case, and noted defendant failed to identify any "contaminating" statement by prospective juror that "might color the entire jury's outlook," thus trial court did not abuse discretion in denying individual voir dire).

Rule 18.6(e) Preparation of jurors—Juror questions.

18.6.e.020 For good cause, a trial court may limit or prohibit the submission of juror questions to a witness.

State v. Villalobos, 225 Ariz. 74, 235 P.3d 227, ¶¶ 32–35 (2010) (after testimony of state's mental health expert, juror submitted question asking whether it was likely defendant could be significantly reformed with help of medications or therapy; trial court did not submit question stating that "doesn't seem to fall within the realm of what mitigation is about"; court held defendant's potential for rehabilitation was mitigating circumstance, therefore trial court incorrectly concluded it was not, but held no reversible error because expert did not diagnose defendant for treatment nor was his expertise on effects of medication or therapy established).

RULE 19. TRIAL.

Rule 19.1(d)(7) Conduct of trial—Penalty hearing in a capital case—Allocution.

19.1.d.7.010 The defendant has a right to make a statement to the jurors before the imposition of sentence, and it is error if the defendant is denied that right.

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶¶ 31–32 (2010) (defendant contended trial court's warning that he might be subject to cross-examination if he disputed guilt during allocution prevented him from freely exercising right to allocution; court noted it had repeatedly upheld trial court's admonitions that defendants may be subject to cross-examination if they exceeded scope of permissible allocution, and thus held trial court did not abuse discretion in so warning defendant).

State v. Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 42–45 (2010) (at trial court's suggestion, defendant presented his allocution statement to trial court, which noted defendant's comments about suicidal thoughts might open door for state to present evidence from its psychologist that defendant's defense team had successfully kept from jurors, so defendant did not say anything about suicidal thoughts; on appeal, defendant contended trial court unconstitutionally interfered with his right of allocution; court held trial court did not interfere because it only made suggestion, thus defendant was free to say whatever he wanted, thus it was his tactical decision not to mention suicidal thoughts).

Rule 19.1(mmt) Conduct of trial—Motion for mistrial.

19.1.mmt.010 The decision whether to grant a mistrial is within the sound discretion of the trial court, and that decision will not be reversed on appeal unless the conduct at trial is palpably improper and clearly injurious.

State v. Gallardo, 225 Ariz. 560, 242 P.3d 159, ¶¶ 5–9 (2010) (trial court impaneled 16 jurors for capital case expected to last 3 months; after instructing jurors not to discuss case until all evidence was presented, trial court learned some jurors had discussed case; upon questioning jurors, parties agree one juror should be excused for hardship; trial court found three jurors should be excused for violating admonition, found three other jurors had formed opinions about other jurors that would affect their deliberations, and found it "highly likely" four other jurors had violated admonition despite denying having done so; under these circumstances, trial court did not abuse discretion in declaring mistrial).

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 17–21 (2010) (during state's guilt phase closing argument, victim's stepmother cried audibly; because record did not contain any direct evidence of level of disruptiveness, and because stepmother was immediately escorted out of courtroom, and because stepmother's tears did not convey any new information to jurors, trial court did not abuse discretion in denying motion for mistrial).

19.1.mmt.100 To determine whether the **prosecutor's** remarks or actions were so objectionable as to require a mistrial, the trial court must consider (1) whether the remarks or actions call to the attention of the jurors matters that they would not be justified in considering, and (2) the probability that the jurors, under the circumstances of the case, were influenced.

State v. Cropper, 223 Ariz. 522, 225 P.3d 579, ¶¶ 12–14 (2010) (at defendant's request, trial court instructed jurors that, to prove (F)(6) cruelty aggravator, state was required to show victim's suffering "existed for a significant period of time"; defendant objected when prosecutor argued that, in determining what was "significant period of time," standard was "subjective" and phrase was defined by "what that means to you"; court noted defendant's requested instruction differed from one Arizona Supreme Court had previously approved, that prosecutor's comments dealt directly with otherwise unexplained jury instruction language defendant requested, and that prosecutor's comments did not dispute essential elements of physical cruelty, and thus held prosecutor did not commit misconduct).

19.1.mmt.230 The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

State v. Gallardo, 225 Ariz. 560, 242 P.3d 159, ¶¶ 46–47 (2010) (court stated record did not suggest pervasive prosecutorial misconduct that deprived defendant of fair trial, so no reason to reverse conviction).

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶ 25 (2010) (court stated that, "even if a defendant fails to establish a specific instance of misconduct warranting reversal, we have found misconduct 'if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct'"; court stated defendant failed to show that any prosecutorial misconduct occurred).

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶ 65 (2010) (court stated that, "Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness,"and that, even assuming that one of cited incidents technically involved misstatement, it found no misconduct and nothing approaching pervasive unfairness in this case).

RULE 20. JUDGMENT OF ACQUITTAL.

Rule 20 Judgment of acquittal.

20.020 The trial court should deny a motion for a judgment of acquittal when there is substantial evidence to support a conviction; substantial evidence is proof that reasonable persons could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.

State v. Davis, 226 Ariz. 97, 244 P.3d 101, ¶¶ 5–8 (Ct. App. 2010) (defendant presented evidence that victim's identifications of him and his car were unreliable and that he could not have been at crime scene or driving perpetrator's vehicle; state presented evidence victim had properly identified defendant as perpetrator and that he had access to vehicle perpetrator was driving; court held this was sufficient evidence for trial court to deny defendant's motion for new trial even though trial court stated "verdict could have gone either way").

Rule 20(b) Judgment of acquittal—After verdict.

20.b.020 If the trial court determines, before the jurors start their deliberations, that the evidence was sufficient, the only basis upon which the trial court may determine, after the jurors have reached their verdict, that the evidence was not sufficient, is if the trial court determines that it made a mistake of law and not that the jurors made a mistake of fact.

State v. West, 224 Ariz. 575, 233 P.3d 1154, ¶¶ 12–14 (Ct. App. 2010) (after trial court denied defendants' Rule 20 motions both at end of state's case and after presentation of all evidence and jurors returned guilty verdicts, trial court granted defendants' renewed Rule 20 motion; because trial court neither found it had previously erred in considering improper evidence nor identified any other legal error affecting quantum of evidence, trial court erred in granting renewed Rule 20 motion).

20.b.030 After trial, a trial court may only redetermine the quantum of evidence if it is satisfied it erred by considering improper evidence during the trial.

State v. West, 224 Ariz. 575, 233 P.3d 1154, ¶¶ 12–14 (Ct. App. 2010) (after trial court denied defendants' Rule 20 motions both at end of state's case and after presentation of all evidence and jurors returned guilty verdicts, trial court granted defendants' renewed Rule 20 motion; because trial court neither found it had previously erred in considering improper evidence nor identified any other legal error affecting quantum of evidence, trial court erred in granting renewed Rule 20 motion).

RULE 21. INSTRUCTIONS.

Rule 21.1 Applicable law.

Lesser-included offenses.

21.1.320 Although the trial court must instruct on the offense charged and any offense necessarily included in the charged offense, if there is no evidence to support a lesser-included offense, the trial court is not required to give a lesser-included offense instruction.

State v. Womble, 225 Ariz. 91, 235 P.3d 244, ¶¶ 19–22 (2010) (defendant was charged with first degree murder, and requested instructions on second degree murder and attempted second degree murder; court stated evidence showed defendant planned murders and that he intended to kill victims, and there was no evidence defendant considered abandoning plans to murder; court stated that, given this overwhelming evidence, no rational juror could fail to find premeditation).

State v. Hargrave, 225 Ariz. 1, 234 P.3d 569, ¶¶ 33–36 (2010) (defendant was charged with armed robbery and requested lesser-included offense instruction of robbery; because evidence was that only force used was a weapon, there was no evidence to support charge of simple robbery, thus trial court properly refused defendant's requested robbery instruction).

First degree murder—Lesser-included offense instruction.

21.13.1105.290 If the defendant is charged with both premeditated and felony murder, if the jurors find the defendant guilty of felony murder only, any error in failing to instruct on second degree murder is harmless.

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶¶ 32–34 (2010) (defendant was charged with both premeditated and felony murder; jurors could not reach unanimous verdict on premeditated murder and found him guilty of felony murder only; court held defendant suffered no prejudice from trial court's refusal to give second degree murder instruction).

Intoxication—Driving while under influence.

21.1.236 A.R.S. § 28–1381(A)(1) prohibits a person from driving or actual physical control of a vehicle while under the influence if the person is impaired to the slightest degree; it does not require that the person's ability to drive a vehicle is impaired.

State v. Miller (Oliveri), ___ Ariz. ___, 245 P.3d 454, ¶¶ 4–10 (Ct. App. 2011) (court held RAJI 28.1381(A)(1)–1, which includes language that "defendant's ability to drive a vehicle was impaired to the slightest degree" was incorrect statement of law).

RULE 22. DELIBERATIONS.

Rule 22.4 Assisting jurors at impasse.

22.4.010 If jurors have come to impasse, trial court has discretion to do various things, including giving additional instructions, clarifying earlier instructions, directing attorneys to make additional arguments, and reopening the evidence for limited purposes.

State v. Kuhs, 223 Ariz. 376, 224 P.3d 192, ¶¶ 40–50 (2010) (on third day after lunch, jurors informed trial court they could not agree on appropriate sentence; with agreement of counsel, trial court instructed jurors to continue deliberating for rest of day; at end of day, jurors informed trial court they were still deadlocked, so trial court had them return next day; next day, trial court suggested giving impasse instruction, and neither counsel objected; that afternoon, jurors announced death penalty verdict; because trial court did not know numerical division and because of length of time before jurors indicated impasse (first 12 hours then 3 hours), court concluded trial court did not abuse discretion).

ARTICLE VII. POST-VERDICT PROCEEDINGS.

RULE 24. POST-TRIAL MOTIONS.

Rule 24.1(c)(2) Motion for new trial—Prosecutorial misconduct.

24.1.c.290 The cumulative error doctrine does apply to claims of prosecutorial misconduct because, even if the several actions are not errors in and of themselves, they may show that the prosecutor intentionally engaged in improper conduct and did so either with indifference or with the specific intent to prejudice the defendant.

State v. Gallardo, 225 Ariz. 560, 242 P.3d 159, ¶¶ 46–47 (2010) (court stated record did not suggest pervasive prosecutorial misconduct that deprived defendant of fair trial, so no reason to reverse conviction).

State v. Chappell, 225 Ariz. 229, 236 P.3d 1176, ¶ 25 (2010) (court stated that, "even if a defendant fails to establish a specific instance of misconduct warranting reversal, we have found misconduct 'if the cumulative effect of the incidents shows that the prosecutor intentionally engaged in improper conduct'"; court stated defendant failed to show that any prosecutorial misconduct occurred).

State v. Lynch, 225 Ariz. 27, 234 P.3d 595, ¶ 65 (2010) (court stated that, "Absent any finding of misconduct, there can be no cumulative effect of misconduct sufficient to permeate the entire atmosphere of the trial with unfairness,"and that, even assuming that one of the cited incidents technically involved misstatement, it found no misconduct and nothing approaching pervasive unfairness in this case).

Rule 24.1(c)(3) Motion for new trial—Juror misconduct.

24.1.c.330 When a juror has considered extrinsic evidence, the trial court must grant a new trial unless it finds beyond a reasonable doubt that such evidence did not affect the verdict; juror misconduct warrants a new trial if the defendant shows actual prejudice or if prejudice may be fairly presumed from the facts; once the defendant shows that the jurors received and considered extrinsic evidence, prejudice must be presumed and a new trial granted unless the state proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict.

State v. Aguilar, 224 Ariz. 299, 230 P.3d 358, ¶¶ 5–30 (Ct. App. 2010) (although trial court admonished jurors at beginning of trial not to consult any source such as Internet and reminded jurors throughout trial to observe admonition, two jurors conducted Internet research on legal definitions of terms in trial court's final instructions and shared that information with other jurors; because this was juror misconduct and because state failed to prove beyond reasonable doubt that jurors' misconduct did not taint verdicts, defendant was entitled to new trial for those counts affected by this extraneous information).

RULE 27. PROBATION AND PROBATION REVOCATION.

Rule 27.1 Manner of imposing probation.

27.1.080 The state may not make waiver of the privilege against self-incrimination a term or condition of probation.

Jacobsen v. Lindberg, 225 Ariz. 318, 238 P.3d 129, ¶¶ 6–13 (Ct. App. 2010) (defendant pled guilty in plea agreement that included sex offender conditions, including polygraph; court noted this could require defendant to make statements about uncharged crimes, and that immunity provided by A.R.S. § 13–4066 was not broad enough to preserve Fifth Amendment privilege against self-incrimination, and thus held defendant may assert privilege against self-incrimination for polygraph questions that may incriminate him).

Rule 27.3 Modification and clarification of conditions and regulations.

27.3.020 The trial court may modify the conditions of probation at any time; the defendant need not violate the conditions of probation before the trial court may modify them.

State v. Dean, 226 Ariz. 47, 243 P.3d 1029, ¶¶ 15–17 (Ct. App. 2010) (probation officer filed motion to terminate defendant's probation based on *State v. Peek,* which held person convicted of attempted child molestation could not receive lifetime probation; because trial court modified defendant's probation under Rule 27.3 rather than terminating it under Rule 27.4, trial court did not have to make determination whether ends of justice would be served).

Rule 27.4 Early termination of probation.

27.4.030 The court may terminate the period of probation or intensive probation and discharge the defendant at a time earlier than originally imposed if, in the court's opinion, the ends of justice will be served and if the conduct of the defendant on probation warrants it.

State v. Lewis, 226 Ariz. 124, 244 P.3d 561, ¶¶ 8–17 (2011) (on 9/15/03, defendant was placed on probation for 5 years; on 9/03/08, defendant's probation officer filed petition to terminate defendant's probation; although defendant was delinquent 245 hours of community service, had paid only $4,200 toward the $6,600 in fines and fees, and had violated probation three times, because defendant had completed 180 days in inpatient drug rehabilitation program and had remained drug-free, had completed 347 hours of community service, had married and had two children, attended church regularly, completed vocational training, and had maintained steady employment with same company for 2 years, trial court did not abuse discretion in terminating defendant's probation and designating it as "unsuccessful" termination).

State v. Dean, 226 Ariz. 47, 243 P.3d 1029, ¶¶ 15–17 (Ct. App. 2010) (because trial court modified defendant's probation under Rule 27.3 rather than terminating it under Rule 27.4, trial court did not have to make determination whether ends of justice would be served).

Rule 27.8(c) Revocation of probation—Disposition hearing.

27.8.c.010 Because statute gives the trial court broad discretion to terminate probation, if Rule 27.8(c)(2), which provides that the trial court may revoke, modify, or continue probation if it determines the defendant had violated probation, were read to prohibit a trial court from terminating probation despite its conclusion that the ends of justice would be served and the conduct of the defendant warrants it, the rule would exceed the court's rule-making powers.

State v. Lewis, 226 Ariz. 124, 244 P.3d 561, ¶¶ 8–10 (2011) (although defendant had violated probation three times over 5-year period and still owed part of fines and fees ordered, because evidence showed defendant had done numerous things that indicated rehabilitation, trial court did not exceed authority in terminating defendant's probation and designating it as "unsuccessful" termination).

ARTICLE VIII. APPEAL AND OTHER POST-CONVICTION RELIEF.

RULE 31. APPEAL FROM SUPERIOR COURT.

Rule 31.8(a) The record on appeal; transcripts; duty of court reporter—Composition of the record on appeal; additions; deletions.

31.8.a.040 When there is a discrepancy between the reporter's transcript and the minute entry, the question is what was the trial court's intent, which may be what is reflected in the reporter's transcript or may be what is reflected in the minute entry; if the trial court's intent can be discerned from the record, the appellate court will so determine, and if the trial court's intent cannot be discerned from the record, the appellate court will remand to the trial court.

State v. Mason, 225 Ariz. 323, 238 P.3d 134, ¶¶ 14–16 (Ct. App. 2010) (defendant noted there was discrepancy between sentencing minute entry and transcript of sentencing hearing; court stated oral pronouncement of sentence controls over written judgment, but affirmed sentence based on what was stated in sentencing transcript).

Rule 31.8(h) The record on appeal; transcripts; duty of court reporter—Correction or modification of the record.

31.8.h.020 If anything material to either party is omitted from the record or is misstated, the parties by stipulation, the trial court (either before or after the record is transmitted to the Appellate Court), or the Appellate Court on motion or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

State v. Diaz, 223 Ariz. 358, 224 P.3d 174, ¶ 18 (2010) (because transcript of polling of jurors contained names of only 11 jurors, appellate court issued opinion that defendant was deprived of right to have 12 jurors decide case, and thus reversed conviction and remanded; 3 days after court had issued its opinion, state's appellate counsel called court reporter and asked her to check her notes and see if perhaps there had been error in transcribing polling of jurors; court reporter then filed "corrected transcript" showing 12 jurors had in fact delivered verdict; court of appeals held oral argument on matter, and state contended court should vacate its opinion and affirm conviction; court noted defendant raised in opening brief claim that only 11 jurors participated, and that state did nothing to attempt to correct record before court issued opinion, thus state's attempt to correct record after court issued opinion was too late; on review, Arizona Supreme Court held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error; court further stated that issue could have been resolved much earlier if state had followed procedure in Rule 31.8(h) to have record corrected).

RULE 32. OTHER POST-CONVICTION RELIEF.

Rule 32.1 Scope of remedy.

32.1.010 A Rule 32 proceeding may be initiated only by a "person who has been convicted of, or sentenced for, a criminal offense."

State v. Dean, 226 Ariz. 47, 243 P.3d 1029, ¶¶ 8–14 (Ct. App. 2010) (probation officer filed motion to terminate defendant's probation based on *State v. Peek,* which held person convicted of attempted child molestation could not receive lifetime probation; court rejected state's contention that only way person could obtain relief was by petition for post-conviction relief; court noted probation officer was one who filed motion, and that probation officer could not file under Rule 32.1).

Rule 32.1(a) Scope of remedy—Constitutional violation.

32.1.a.010 A defendant must use this provision to raise a claim of ineffective assistance of counsel, whether the challenged action took place at trial, on appeal, in a probation revocation proceeding, or in a first petition for post-conviction relief after a guilty plea; and if the defendant raises a claim of ineffective assistance of counsel on direct appeal or in a first petition for post-conviction relief after a guilty plea, the appellate court will not address that issue.

State v. Petty, 225 Ariz. 369, 238 P.3d 637, ¶¶ 6–14 (Ct. App. 2010) (defendant pled guilty to theft pursuant to plea agreement; defendant filed his of-right notice and petition for post-conviction relief, and trial court granted partial relief; within 30-day period, defendant's same attorney filed second petition for post-conviction relief indicating as possible claim that defendant received ineffective assistance of counsel in first PCR, and asked trial court to

appoint new attorney for defendant; court held trial court erred in dismissing this second PCR because defendant could not raise in first PCR claim that PCR attorney provided ineffective assistance of counsel, thus only way defendant could present such claim was in second PCR).

Rule 32.2(a) Preclusion of remedy—Preclusion.

32.2.a.060 If the defendant is not able to raise a claim in a previous collateral proceeding, the court will not consider that claim waived.

State v. Petty, 225 Ariz. 369, 238 P.3d 637, ¶¶ 6–14 (Ct. App. 2010) (defendant pled guilty to theft pursuant to plea agreement; defendant filed his of-right notice and petition for post-conviction relief, and trial court granted partial relief; within 30-day period, defendant's same attorney filed second petition for post-conviction relief indicating as possible claim that defendant received ineffective assistance of counsel in first PCR, and asked trial court to appoint new attorney for defendant; court held trial court erred in dismissing this second PCR because defendant could not raise in first PCR claim that PCR attorney provided ineffective assistance of counsel, thus only way defendant could present such claim was in second PCR).

ARTICLE IX. POWERS OF COURT.

RULE 33. CRIMINAL CONTEMPT.

Rule 33.1 Definition. (Criminal contempt.)

33.1.020 Contempt is criminal when the person is imprisoned for a particular period, and is civil when the person is held until the person chooses to follow the order of the court.

Stoddard v. Donahoe, 224 Ariz. 152, 228 P.3d 144, ¶¶ 12–17 (Ct. App. 2010) (because sanction was that trial court ordered deputy to apologize publicly for looking at papers in file on table for defense counsel and remain in jail until he did apologize, contempt was civil).

ARTICLE X. ADDITIONAL RULES.

SPECIAL ACTIONS.

Rule 1 Nature of the special action.

1.sa.100 Special action review **is available** when the party does not have an equally plain, speedy, and adequate remedy by appeal.

State v. Miller (Estrella), ___ Ariz. ___, 245 P.3d 887, ¶ 2 (Ct. App. 2010) (trial court ruled state could not authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on testimony of person who monitored and transcribed numerous wiretap recordings from defendant and persons connected with defendant; court held state had no equally plain, speedy, and adequate remedy by appeal, thus special action review was appropriate).

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216, ¶ 5 (Ct. App. 2010) (family members of murder victim would not have had adequate post-trial remedy to challenge trial court's order granting defendant *ex parte* hearing to address defendant's mitigation matters, thus special action was appropriate).

State v. Nichols (Ergonis), 224 Ariz. 569, 233 P.3d 1148, ¶ 2 (Ct. App. 2010) (state did not have adequate remedy by appeal to challenge trial court's ruling that victim, who was later charged with unrelated offense and taken into custody, was no longer considered "victim" under Victim's Bill of Rights and therefore had to submit to interview by defendant's attorney).

1.sa.230 Special action review is available to review a contempt order in appropriate circumstances.

Stoddard v. Donahoe, 224 Ariz. 152, 228 P.3d 144, ¶ 7 (Ct. App. 2010) (judge held deputy in contempt for looking at and then taking papers in file folder on table for defense counsel).

1.sa.300 Special action is appropriate when the matter (1) involved only legal question and there are no factual issues, (2) was of first impression, (3) was of statewide importance, (4) was likely to recur, or (5) had received inconsistent decisions by different trial courts.

State v. Miller (Estrella), ___ Ariz. ___, 245 P.3d 887, ¶ 2 (Ct. App. 2010) (whether party may authenticate law enforcement interview tapes and jailhouse telephone calls by identifying voices on tapes based on testimony of person who monitored and transcribed numerous wiretap recordings (1) involved only legal question, (3) was of statewide importance, and (4) was likely to recur, thus special action review was appropriate).

State v. Dean, 226 Ariz. 47, 243 P.3d 1029, ¶ 5 (Ct. App. 2010) (whether trial court may modify lifetime probation when it appears defendant committed offense during period when lifetime probation was not available (1) involved only legal question, (2) was of first impression, (3) was of statewide importance, and (4) was likely to recur, thus special action review was appropriate).

Rivera-Longoria v. Slayton, 225 Ariz. 572, 242 P.3d 171, ¶ 5 (Ct. App. 2010) (whether "deadline" as used in Rule 15.8 means actual stated date by which a plea offer expires or date when state withdraws plea offer (1) involved only legal question, and (2) was of first impression, thus special action review was appropriate).

Potter v. Vanderpool, 225 Ariz. 495, 240 P.3d 1257, ¶ 6 (Ct. App. 2010) (once lower court judge has conducted pre-screening examination, granted motion for full mental health examination, and transferred matter to superior court, whether superior court judge may revisit issue whether defendant should receive full mental health examination or must instead appoint mental health experts to conduct full Rule 11 examination (1) involved only legal question, (3) was of statewide importance, and (4) was likely to recur, thus special action was appropriate).

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216, ¶ 5 (Ct. App. 2010) (whether trial court properly granted defendant's request for *ex parte* hearing to address defendant's mitigation matters (1) involved only legal question, thus special action was appropriate).

State v. Nichols (Ergonis), 224 Ariz. 569, 233 P.3d 1148, ¶ 2 (Ct. App. 2010) (whether victim who was later charged with unrelated offense and taken into custody retained or lost status as "victim" under Victim's Bill of Rights (1) involved only legal question, (2) was of first impression, and (3) was of statewide importance, thus special action review was appropriate).

Rule 2(a)(2) Parties—Victims.

2.a.2.sa.010 The victim has standing to seek an order or to bring a special action mandating that the victim be afforded any of the victim's rights or to challenge an order denying any of the victim's rights.

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216, ¶ 5 (Ct. App. 2010) (family members of murder victim had standing to bring special action to challenge trial court's order granting defendant *ex parte* hearing to address defendant's mitigation matters).

State v. Nichols (Ergonis), 224 Ariz. 569, 233 P.3d 1148, ¶ 2 (Ct. App. 2010) (state's special action was appropriate to present issue whether victim who is later charged with unrelated offense and taken into custody retains or loses status as "victim" under Victim's Bill of Rights).

ARTICLE X. ADDITIONAL RULES.

RULES OF THE ARIZONA SUPREME COURT.

RULES OF PROFESSIONAL CONDUCT.

Rule 31(a)(2)(B)(1) Regulation of the Practice of Law—Supreme Court Jurisdiction Over the Practice of Law—Definitions—Unauthorized practice of law.

31.a.2.B.010 Unauthorized practice of law includes engaging in the practice of law by a person or entity not authorized to practice law pursuant to Rule 31(b) or (c), or not specially admitted to practice pursuant to Rule 33(d).

State v. Eazy Bail Bonds, 224 Ariz. 227, 229 P.3d 239, ¶¶ 9–11 (Ct. App. 2010) (president of bail bond company appeared on behalf of bail bond company; because president was not member of State Bar, was not specially admitted to practice under Rule 33(c), and was not exempt under Rule 31(d), appellants conceded president was unable to represent appellants pursuant to Rule 31).

31.a.2.B.020 A corporation may not appear in superior court except through counsel.

State v. Eazy Bail Bonds, 224 Ariz. 227, 229 P.3d 239, ¶¶ 12–17 (Ct. App. 2010) (president of bail bond company appeared on behalf of bail bond company; because president was not permitted to represent bail bond company pursuant to Rule 31, bail bond company was considered not to have made appearance at bond forfeiture hearing, thus trial court properly forfeited bond).

Rule 31(b) Regulation of the Practice of Law—Authority to Practice.

31.b.010 No person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the State Bar or is exempt under Rule 31(d).

State v. Eazy Bail Bonds, 224 Ariz. 227, 229 P.3d 239, ¶¶ 9–11 (Ct. App. 2010) (president of bail bond company appeared on behalf of bail bond company; because president was not member of State Bar, was not specially admitted to practice under Rule 33(c), and was not exempt under Rule 31(d), appellants conceded president was unable to represent appellants pursuant to Rule 31).

Rule 36(b)(2) Procedure before the Committee on Character and Fitness—Determination of Character and Fitness; Burden of Proof; Relevant Factors and Evaluation—Conviction of a Crime.

36.b.2.010 There is a presumption that an applicant who has been convicted of a misdemeanor involving a serious crime or a felony shall be denied admission; to rebut that presumption, the applicant must provide clear and convincing evidence of rehabilitation.

In re Lazcano, 223 Ariz. 280, 222 P.3d 896, ¶ 6 (2010) (applicant was charged with burglary and sexual assault in Texas and pled no contest to reduced charge of attempted sexual assault; Texas court deferred adjudication while applicant completed 10-year term of probation, which included 240 hours of community service and sex offender registration; if applicant successfully completes probation, court may dismiss charges; if not, he may be sent to prison without a trial).

36.b.2.020 An applicant who is currently on felony deferred adjudication and under court supervision may not be admitted to practice law until the period of supervision has ended, and only after successfully fulfilling the conditions of a felony deferred adjudication may an applicant make the necessary showing of complete rehabilitation necessary for admission to the State Bar.

In re Lazcano, 223 Ariz. 280, 222 P.3d 896, ¶ 17 (2010) (applicant was charged with burglary and sexual assault in Texas and pled no contest to reduced charge of attempted sexual assault; Texas court deferred adjudication while applicant completed 10-year term of probation, which would end in 2013; court thus denied his application for admission to State Bar of Arizona).

Rule 42, ER 5.1(a) Responsibility of Partners, Managers, and Supervisory Lawyers—Partners.

5.1.a.010 A partner or an attorney with comparable managerial authority shall make reasonable efforts to ensure the firm has in effect measures giving reasonable assurances that all lawyers in the firm conform to the Rules of Professional Conduct; this section does not provide for vicarious liability, but instead mandates an independent duty of supervision.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 24–25 (2010) (court concluded Hearing Officer did not apply incorrect vicarious liability standard and instead found Phillips had personally failed to engage in required supervision of lawyers).

Rule 42, ER 5.3(a) Responsibility Regarding Nonlawyer Assistants—Partner or attorney with comparable managerial authority.

5.3.a.010 A partner or an attorney with comparable managerial authority shall make reasonable efforts to ensure the firm has in effect measures giving reasonable assurances that nonlawyers employed by the firm or associated with the lawyer comply with the professional obligations of the lawyer; this section does not provide for vicarious liability, but instead mandates an independent duty of supervision.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 24–25 (2010) (court concluded Hearing Officer did not apply incorrect vicarious liability standard and instead found Phillips had personally failed to engage in required supervision of non-lawyer personnel).

Rule 60(a) Disciplinary sanctions—Types and forms of sanctions.

60.a.020 In determining the appropriate sanction, the court should consider **four** factors, the **first** of which is the duty violated.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 29–30 (2010) (court noted ABA Standard 7.0 provides sanctions for violations of duties owed as professional, and that although Phillips' violations implicated duties owed to clients, it would use this standard to guide its analysis).

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 11–12 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer concluded attorney commingled and converted client funds; court held attorney breached duties owed to client to maintain and safeguard their property).

60.a.030 In determining the appropriate sanction, the court should consider **four** factors, the **second** of which is the attorney's mental state.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 29, 31–35 (2010) (under ABA Standard 7.0, disbarment is generally appropriate when lawyer knowingly violates professional duty with intent to obtain benefit and causes serious or potentially serious injury to client, public, or legal system; suspension is generally appropriate when lawyer knowingly violates professional duty and causes injury or potential injury to client, public, or legal system; and reprimand is generally appropriate when a lawyer negligently violates professional duty and causes injury or potential injury to client, public, or legal system; because Phillips' knowing conduct caused actual injury to clients, court agreed with Hearing Officer that presumptive sanction was suspension).

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 13–22 (2009) (When attorney causes injury or potential injury to client, ABA Standard 4.12 provides suspension or even disbarment may be appropriate if the attorney was grossly negligent in failing to establish proper accounting procedures; suspension is appropriate when attorney knew or should have known he or she was dealing improperly with a client's property; ABA Standard 4.13 provides that reprimand (which would include censure under Arizona's disciplinary procedures) is appropriate when an attorney was negligent in dealing with a client's property; law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer concluded attorney acted negligently, but Disciplinary Commission disagreed and concluded attorney knew or should have known her conduct was improper; court concluded there was reasonable basis for Hearing Officer to conclude attorney acted negligently, and concluded Disciplinary Commission should not have substituted its judgment for that of Hearing Officer; because Hearing Officer found attorney acted negligently, censure was appropriate sanction; court noted State Bar did not ask Hearing Officer to find attorney acted with gross negligence).

60.a.040 In determining the appropriate sanction, the court should consider **four** factors, the **third** of which is the actual or potential injury caused by the misconduct.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 29, 34 (2010) (Hearing Officer found clients were actually injured by (1) being misled and improperly advised by unqualified lawyers, (2) having difficulty obtaining refunds, and (3) being misinformed about reasonable objectives of representation; clients were also financially harmed by paying unreasonable fees or retainers without full understanding of likely results of representation).

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶ 19 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer found attorney's actions caused actual harm to clients because she paid one client's debt with other client's funds and did not deposit sufficient personal funds to pay bank service fees; court held record supported Hearing Officer's findings).

60.a.050 In determining the appropriate sanction, the court should consider **four** factors, the **fourth** of which is the existence of aggravating and mitigating circumstances.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 29, 35–36 (2010) (Hearing Officer and Commission found following: Aggravating factors: (1) prior disciplinary offense; (2) selfish motive; (3) multiple offenses; (4) refusal to acknowledge wrongful nature of conduct; (5) vulnerability of victim; and (6) substantial experience in practice of law; Mitigating factors: (1) full and free disclosure to Bar; (2) delay in disciplinary proceedings; (3) willingness to remedy practice; and (4) character; court agreed aggravating and mitigating factors, in conjunction with knowing misconduct, supported suspension as appropriate sanction).

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶ 23 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; Hearing Officer found two aggravating circumstances (prior disciplinary action; refusal to acknowledge wrongful nature of conduct) and two mitigating circumstances (absence of dishonest or selfish motive; character and reputation); court agreed with Hearing Officer's conclusion that aggravating and mitigating circumstances did not alter presumptive sanction of censure).

60.a.060 Upon its review to determine whether the sanction was appropriate, the Arizona Supreme Court will consider similar cases to assess whether the sanction is proportional to the improper conduct.

In re Phillips, 226 Ariz. 112, 244 P.3d 549, ¶¶ 37–44 (2010) (although head of criminal division (Arentz) had more ethical violations than did Phillips and violated more ethical sections, Phillips had prior ethical violations and had greater supervisory authority than Arentz, thus longer suspension for Phillips was justified, but because Arentz received suspension of only 60 days, court reduced Phillips' suspension from 6 months and 1 day to 6 months only).

In re White-Steiner, 219 Ariz. 323, 198 P.3d 1195, ¶¶ 24–26 (2009) (law firm used credit card account, which was not trust account, to receive both client funds and earned fees; attorney contended that other cases involving negligent trust account violations have resulted in censure combined with probation; State Bar did not disagree; court concluded appropriate sanction was censure combined with 2 years probation, which would include LOMAP, and State Bar's Trust Account Program and Trust Account Ethics Enhancement Program).